LIBRARY
SUPREME COURT. U. S.

MOTION FILED MAY 9 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF WESTERN NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN C. DAWSON
LIDDELL, AUSTIN, DAWSON & SAPP
510 Gulf Building
Houston, Texas

GEORGE D. HORNING, JR.
PATRICK G. SULLIVAN
J. COLIN LIZOTTE
HOGAN & HARTSON
800 Colorado Building
Washington, D.C.

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF WESTERN NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Movant, Western Natural Gas Company, a Delaware Corporation, by its attorneys and pursuant to the provisions of Rule 42(3) of this Honorable Court, respectfully moves that it be granted leave to file the accompanying brief *amicus curiae* in this case. The consent of the Petitioner has been obtained. The consent of the Respondent was requested but refused.

As will appear below, the disposition made of the Petition for Writ of Certiorari herein and the disposition made of the case on its merits in the event the petition is granted will directly affect Movant in a similar case and will resolve a matter of national consequence.

Movant believes that while the basic issue in both Petitioner's and Movant's cases is the question of the Federal Power Commission's acceptance for filing of documents tendered to the Commission and the rate shown thereby, there are other factors present in Mo-

vant's case which bear on a correct determination of the issue and should be presented to the Court.

Movant also believes that while the petition herein clearly and correctly presents the basic issue involved, the broad impact of the lower court's decision on all segments of the natural gas industry and its destructive effect on the Federal Power Commission's efforts at regulation under the Natural Gas Act[1] should be more fully explained for a proper understanding by the Court of the importance of the case.

Like Petitioner, Movant at the time of this Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 347 U.S. 672 (1954) reh. denied 348 U.S. 851, was producing and selling natural gas from the Kansas Hugoton Field to an interstate pipeline company, in this instance Cities Service Gas Company (Cities Service). The then effective price being collected by Movant and paid by the pipeline was 11¢ per Mcf as required by the pricing order issued by the Kansas Corporation Commission on December 2, 1953. This order became effective January 1, 1954. Following this Court's decision in the *Phillips* case, *supra*, the Federal Power Commission issued its Series 174 Orders[2] requiring producers, (1) to file the documents and billing statements evidencing their prices effective June 7, 1954, and (2) forbidding any change in any such price without filing a proper change in rate with the Commission. In accordance with the requirements of such Commission orders, Movant filed as its rate for gas sold to Cities Service on and after June 7, 1954, and effective until changed by a proper filing, its

---

[1] Act of June 21, 1938, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w.

[2] Order No. 174, issued July 16, 1954 (13 FPC 1195) as amended and modified by Order No. 174A, issued August 6, 1954 (13 FPC 1255) and Order No. 174B, issued December 17, 1954 (13 FPC 1576).

basic gas sale contract with Cities Service providing for an 8¢ per Mcf price, together with a copy of the Kansas pricing order and the 11¢ billing statement made to it by Cities Service. Copies of this filing were delivered to Cities Service, which made no objection thereto. In due time the Commission met and by formal vote accepted the tendered documents for filing, designated the contract as Movant's Rate Schedule No. 17, the Kansas Price Order as Supplement No. 3 thereto and noted the 11¢ price thereby shown.

Movant's purchaser made no protest to the Commission of such action or of the rate thereby accepted for filing, and prosecuted no appeal therefrom. Instead, such purchaser paid in accordance therewith until the first settlement following the January 20, 1958 decision[3] of this Court declaring the Kansas pricing order void *ab initio* as invading the jurisdiction of the Federal Power Commission. Movant's purchaser then unilaterally and without seeking any authority from the Federal Power Commission commenced paying Movant 8¢ per Mcf as set forth in the basic contract between the parties rather than the 11¢ rate as shown in Movant's filings with the Federal Power Commission. Movant promptly sought relief from the Federal Power Commission by filing with it, in Docket No. G-14958, a complaint against Cities Service seeking a declaratory order determining the legal rate and requiring its observance. The purchaser resisted such action and despite repeated efforts by Movant no hearing by the Federal Power Commission has yet been held on such complaint.

While resisting Federal Power Commission action on Movant's said complaint, and without seeking action or approval of any kind from that Commission, Cities

[3] *Cities Service Gas Company v. State Corporation Commission of Kansas, et al.*, 355 U.S. 391 (1958).

Service brought a common law action against Movant in a Delaware state court[4] seeking restitution of the amounts paid to Movant in excess of the 8¢ contract rate. In deciding one phase of this case, the trial court in an opinion rendered May 24, 1960 declared in effect that the contract rate and not the rate as filed with the Federal Power Commission was the legal rate *ab initio*. Final judgment has not yet been entered in this action.

Meanwhile, when Cities Service ceased paying Movant on the basis of the 11¢ rate as filed, certain of Movant's royalty owners brought an action[5] against Movant and Cities Service in a Kansas state court seeking a declaratory order that the 11¢ rate continued to be effective until changed in accordance with the procedures provided by the Natural Gas Act, and that royalties should therefore be determined on the basis of the 11¢ rate and not on the basis of the 8¢ contract price. This action is still pending.

Also during this period the Commission instituted and conducted under Section 5 of the Natural Gas Act[6] an investigation into all of Movant's rates and charges. In hearings on this matter, the Commission's Staff in determining the reasonableness of Movant's revenues gave full recognition to the 11¢ rate as filed as the legal rate for Movant's sales to Cities Service. The Commission dismissed this proceeding against Movant without disturbing said 11¢ rate on January 29, 1960.[7]

---

[4] *Cities Service Gas Company v. Western Natural Gas Company*, Civil Action No. 674, Superior Court in and for New Castle County, Delaware.

[5] *Shore v. Western Natural Gas Co. & Cities Service Gas Co.*, Case No. 2358, Dist. Ct. of Stanton County, Kansas; September, 1958.

[6] 15 U.S.C. § 717d.

[7] *Matter of Western Natural Gas Company*, 23 FPC 235.

The importance of the issue tendered to this Court by Petitioner in the case at bar is not confined to Petitioner and Movant. As is shown in the attached brief, during the five year period from 1957 to 1961, approximately 78% of the rate increases filed by independent producers, and approximately 19% of the rate increases filed by pipeline companies, were merely accepted for filing and were permitted to go into effect without any proceeding by the Commission to determine the justness and reasonableness of the rates proposed. All such rates thus filed and accepted are made suspect by the decision below, since in the view of that court neither the documents accepted for filing and the price evidenced thereby, nor the rate set forth in the Commission's order accepting the rate filing, establishes the legal rate. Instead, determination of such rate is left for later adjudication by the courts in actions at common law to determine and enforce the contractual obligations of the parties.

Movant respectfully submits that the foregoing not only demonstrates that the uncertainty, vexation, costly litigation and frustration which Movant has suffered in seeking certainty of its rights and liabilities will be perpetuated by the decision below; it also demonstrates that similar uncertainty, vexation, costly litigation and frustration will necessarily plague all segments of the natural gas industry subject to Federal regulation unless the question at issue is accepted for determination and put at rest by this Honorable Court.

WHEREFORE, Movant prays that this Court grant this motion and permit the filing herein of the attached brief in support of the granting of this Writ of Certiorari.

Respectfully submitted,

JOHN C. DAWSON
LIDDELL, AUSTIN, DAWSON & SAPP
510 Gulf Building
Houston, Texas

GEORGE D. HORNING, JR.
PATRICK G. SULLIVAN
J. COLIN LIZOTTE
HOGAN & HARTSON
800 Colorado Building
Washington, D. C.

Attorneys for Amicus Curiae

INDEX

Page

Motion for Leave to File Brief Amicus Curiae of Western Natural Gas Company in Support of Petition for a Writ of Certiorari 1

Brief Amicus Curiae of Western Natural Gas Company in Support of Petition for a Writ of Certiorari ... 7

Interest of Amicus Curiae 7

Reasons for Granting the Writ:

1. The Decision Below Is of Broad National Significance Because It Marks a Radical Departure From the Regulatory Scheme Contemplated by the Natural Gas Act and Renders Effective Regulation Impossible 7

2. The Filed and Finally Accepted Rate Is the One and Only Rate Which May Be Charged and Collected For Sales of Natural Gas in Interstate Commerce 14

3. Exhaustion of Administrative Remedies Should Have Been Had Prior to Resort to the Courts .. 18

4. Conclusion 19

CITATIONS

CASES:

Backus Brooks Co., v. *Northern Pacific Railway Co.*, 21 F. 2d 4 (8th Cir., 1927) *cert.* denied 275 U.S. 562 .. 14

Chicago, Indianapolis & Louisville Railway Co., v. *International Milling Co.*, 43 F. 2d 93 (8th Cir., 1930) 14

Federal Power Commission et al. v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947) 19

Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) 12

Macauley, Acting Chairman of the United States Maritime Commission v. *Waterman Steamship Corporation*, 327 U.S. 540 (1946) 19

Page

Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir., 1949) 14
Mississippi Power & Light Co. v. *Memphis Natural Gas Co.*, 162 F. 2d 888 (5th Cir., 1947), *cert.* denied 332 U.S. 770 14
Montana-Dakota Utilities Co. v. *Northeastern Public Service Co.*, 341 U.S. 246 (1951) 14, 18
Myers et al. v. *Bethlehem Shipbuilding Corp.*, 313 U.S. 41 (1938) 19
Hope Natural Gas Co. v. *Federal Power Commission*, 134 F. 2d 287 (4th Cir., 1943), rev'd. on other grounds, 320 U.S. 591 14
Phillips Petroleum Co. v. *State of Wisconsin*, 347 U.S. 672, (1954), reh. denied 348 U.S. 851 ..... 12, 15
Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 364 U.S. 137 (1960), reh. denied, 364 U.S. 856 12
Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 14
The Portsmouth Co. v. *Federal Power Commission et al.*, 247 F. 2d 901 (D.C. Cir., 1957) 10
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 10
United States v. *Interstate Commerce Commission*, 337 U.S. 426 (1949) 14
United States v. *Jones*, 336 U.S. 641 (1949) 14
Watab Paper Co. v. *Northern Pacific Railway Co.*, 154 F. 2d 436 (8th Cir., 1946) 14, 15
Woodrich, et al. v. *Northern Pacific Railway Co.*, 71 F. 2d 732 (8th Cir., 1934) 14

STATUTES AND REGULATIONS

Natural Gas Act:
Section 4 (a); 52 Stat. 822 (1938); 15 U.S.C. § 717(c) 15, 19
Section 4 (b) 15
Section 4 (c) 15
Section 4 (d) 15, 16, 19
Section 4 (e) 16, 19
Section 5 (a); 52 Stat. 823 (1938); 15 U.S.C. § 717(d) 17

Page

Section 6; 52 Stat. 824 (1938); 15 U.S.C. § 717(e) 17
Section 8; 52 Stat. 825 (1938); 15 U.S.C. § 717(g) 17
Section 9; 52 Stat. 826 (1938); 15 U.S.C. § 717(h) 17
Section 10; 52 Stat. 826 (1938); 15 U.S.C. § 717(i) 17
Section 14; 52 Stat. 828 (1938); 15 U.S.C. § 717(m) 17
Section 16; 52 Stat. 830 (1938); 15 U.S.C. § 717(o) 17, 19
Section 19 (b); 52 Stat. 831 (1938); 15 U.S.C. § 717(r) 17, 19
Section 20; 52 Stat. 832 (1938); 15 U.S.C. § 717(s) 17
Section 21; 52 Stat. 833 (1938); 15 U.S.C. § 717(t) 17

Federal Power Commission Regulations under the Natural Gas Act 18 C.F.R.:
Section 154.91 (a) 16
Section 154.91 (b) 16

MISCELLANEOUS

Black's Law Dictionary, 4th edition 1951 10
Federal Power Commission Orders No. 174, 13 F.P.C. 1195 ..... 8, 11, 15, 16
Federal Power Commission Order No. 232-A, 25 F.R. 2850 9
Federal Power Commission Order No. 242, 27 F.R. 1356 9
Brief *Amicus Curiae* of Federal Power Commission, No. 77, Oct. 1950, *Montana-Dakota Utilities Co.*, v. *Northwestern Public Service Co.* 11, 12
Shore v. *Western Natural Gas Co., & Cities Service Natural Gas Co.*, Case No. 2358, Dist. Ct. of Stanton County, Kansas; September, 1958 4
Cities Service Gas Company v. *Western Natural Gas Company*, Civil Action No. 674, The Superior Ct. of the State of Delaware, in and for New Castle County; June, 1958 4
Thirty-Seventh through Forty-first Annual Reports of the Federal Power Commission, Fiscal Years 1957-1961 13
Brief of Federal Power Commission, *Northwest Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F. 2d 19, 8th Cir. (1950) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Respondent*

BRIEF AMICUS CURIAE OF WESTERN NATURAL GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of the Amicus in this case is set forth in the motion to which this brief is attached.

REASONS FOR GRANTING THE WRIT

1. The Decision Below is of Broad National Significance Because It Marks a Radical Departure From the Regulatory Scheme Contemplated by the Natural Gas Act and Renders Effective Regulation Impossible.

Contrary to traditional and established concepts of rate regulation under the Natural Gas Act,[1] the court below has held that the legal rate for the sale of natural gas in interstate commerce may be adjudicated by a

[1] Act of June 21, 1938, 52 Stat. 821-833; 15 U.S.C. §§ 717-717w.

court in private litigation between the buyer and the seller—litigation to which the Federal Power Commission is neither a necessary nor an invited party. Such is the rule announced and enforced below, notwithstanding the fact that all documents pertaining to the sale have been filed with, and accepted for filing by, the Federal Power Commission as the seller's FPC Gas Rate Schedule governing that sale.

Under this new and novel concept, neither the Commission's acceptance of documents filed as tariffs or rate schedules by the seller pursuant to the provisions of the Natural Gas Act and to Commission's series of Orders No. 174, nor the Commission's order evidencing that acceptance, operates to establish or to fix the legal rate. Instead, the court below would make controlling the contractual agreement between the seller and the buyer as subsequently construed in future litigation brought in any court having jurisdiction over the parties in a common law action for debt or restitution.

This result is reached through legal legerdemain by which the lower court has been persuaded to hold that a law, or a particular provision prescribing the rate at the time of Commission acceptance of the filing, never in fact existed since in subsequent unrelated litigation years later it is found invalid *ab initio*. Implicit in the Court's holding is the determination that the Commission's action in accepting the filing and permitting the given rate to become effective is without legal significance.

In the case at bar, a state order sufficiently vital and alive at the time of filing to be observed both by the buyer and seller is held to have vanished retroactively

by virtue of subsequent declaration of invalidity, and the recognition given it by the Commission at the time of its acceptance for filing is declared a nullity. By the same reasoning, tomorrow a provision written in a contract by the parties and accepted for filing as establishing a rate may be declared to have never existed for filing nor to have been subject to Commission acceptance because found void *ab initio* years later.

The Commission recently declared favored nations clauses contrary to sound rate policy and ordered them deleted from future filings.[2] Where so deleted by a producer in compliance with these orders, and upon the express condition that these orders are valid, would not the rate which would have been established thereby be held retroactively to have been, in fact, the true rate, should the Commission's orders be later held void *ab initio*?

In the case at bar the result is to determine the rate lower than as originally filed. But this path does not lead downward only; it can also lead upward. Had the seller treated the pricing order as void at the time of the rate filing and had it accordingly tendered only the 8¢ contract, would not a later determination declaring the pricing order to have been valid *ab initio* make the binding agreement—hence the effective rate from the beginning—that commanded by the pricing order and not that shown in the documents filed? And would not the producer then be allowed by suit against the buyer in any court otherwise having jurisdiction to recover judgment against the purchaser for the difference between the rate shown in the filing and the truly

[2] Orders Nos. 232-A and 242, 25 F.R. 2850, 27 F.R. 1356.

binding rate prescribed by the contract as modified by the pricing law?

The lower court cites also in support of its position the doctrine of the *Mobile*[3] case, declaring the producer's filing of the minimum price order and price prescribed thereby to have been a "unilateral" filing, hence beyond the jurisdiction of the Commission to accept. Even if we concede correctness of the unilateral character of the filing within the meaning of the *Mobile*, case *supra*, we believe a proper construction of the law requires giving validity to the rate *as filed*, since it was accepted for filing unconditionally by the Commission and no protest or appeal from the order accepting the filing was taken by any interested party as contemplated in the Act.[4] However, we do not concede that the filing of the pricing order here was in any sense a unilateral filing by the producer. "Unilateral", by dictionary definition means "one-sided; ex parte; having relation to only one of two or more persons or things" (Black's Law Dictionary, 4th Ed., 1951).

In the *Mobile*, case, a seller under a contract providing a fixed price acting under no compulsion of law but entirely upon its own volition and for its own purpose tendered for filing a higher rate, to which the purchaser had given no assent. The filing, being duly protested and appealed from as provided by the Act, was held unauthorized. In the instant case the filing alleged to be unilateral was a state pricing order which, at that time, was observed by both buyer and seller and was binding upon both until ultimately ad-

---

[3] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332.

[4] *The Portsmouth Gas Co.* v. *F.P.C., et al.*, 247 F. 2d 901 (D.C. Cir., 1957).

judicated otherwise.[5] The seller in making the filing was thereby acting in compliance with injunctive requirements of the Federal Power Commission under its Order No. 174[6] requiring producers to file and exhibit the rates in effect on June 7, 1954 including effective billing statement, and enjoining any change therein without further filing with the Commission. Thus, the filing and the rate here attacked was not one tendered for filing by choice of the seller. It was one required by law to be observed by both seller and buyer, and one which the seller by express order of the Commission was required to make.

The price provision attacked here should be likened to a contract clause mutually agreed upon by buyer and seller providing a basis for determining a price which clause is later held void *ab initio* by a court of competent jurisdiction, as contrary to public policy or beyond the contractual capacity of the parties. Consisteney with the decision below would require holding that, even though such contract provision was agreed upon by the parties, was tendered and unconditionally accepted for filing by the Commission, and was not protested or appealed from by the purchaser, either party could by court proceeding years later obtain effective adjudication that the price and legal rate was not that as tendered and accepted, but was the contract rate as it stood after excision of the invalid provision. The regulatory chaos resulting from such a holding is obvious.

And the Federal Power Commission itself in an able and exhaustive brief *amicus curiae* filed in this Court

---

[6] 18 C.F.R. § 154.91.

[5] Movant's observance was required under threat of criminal penalty and a question exists as to whether such criminal penalty applied also to the purchaser.

in *Montana-Dakota Utilities Co.*, v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), "raises questions important to the administration of the Federal Power Act, and by close analogy the Natural Gas Act,"[7] demonstrated the necessity of according sanctity to rates as accepted for filing regardless of questions of their reasonableness or even fraud in the filing. Such brief showed that neither of these Acts either provided for or reserved a common law right to reparation, and that the legal process provided thereby afforded ready right to relief, prospectively, through the Commission for one aggrieved at any allegedly improper or incomplete filing. It showed also that reparation, if awarded, would not benefit consumers but would merely provide a windfall to the pipelines or distributors.

By denying the applicability of the filed rate doctrine to all rates which have been filed and accepted by the Commission, but which have not been made subject of a "just and reasonable" hearing before the Commission or of an order "approving, rejecting or in any way affecting such rates," the whole purpose of the Natural Gas Act is frustrated. This Court has repeatedly held that the primary aim of the Natural Gas Act was to protect the ultimate consumer from exploitation and excessive charges at the hands of natural gas companies. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960), reh. denied, 364 U.S. 856; *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), reh. denied 348 U.S. 851; *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). How can that aim be achieved when the prices at which natural gas is purchased and sold are not known?

[7] Brief of *Amicus Curiae* Federal Power Commission, p. 2.

To illustrate the breadth of the problem, in the five-year period from 1957 to 1961, 4,725, or approximately 78 percent, of the rate increases of independent producers were permitted to go into effect without suspension by the Commission.[8] During that same period, 7,227 rate schedules for proposed new services were tendered to the Commission[9] by independent producers. How many of these were permitted to go into effect in the same manner as the Petitioner's rate schedules in the case at bar is not clearly reported, but it is reasonable to assume that the number is substantial. To further complicate the matter, since the Natural Gas Act applies to pipeline companies as well as to independent producers, no legal reason exists why the rationale of the decision below should not apply to arrangements between pipeline companies and their customers. In the five-year period from 1957 to 1961, nearly one-fifth of the rate increases filed by pipeline companies were permitted to become effective without suspension.[10] According to the court below, until such time as the Federal Power Commission takes formal action with respect to the gas purchase price, the legal rate may be determined to have been different—higher or lower—than shown in the documents accepted for

---

[8] As shown in the Thirty-Seventh through the Forty-First Annual Reports of the Federal Power Commission for the fiscal years 1957-1961, 1,123 independent producer rate increases became effective without suspension in fiscal year 1957, 1,370 in fiscal year 1958, 951 in fiscal year 1959, 654 in fiscal year 1960 and 627 in fiscal year 1961. During this period the Commission disposed of 6,026 independent producer rate increases.

[9] Ibid. 1,183 were filed in fiscal year 1957, 1,200 in fiscal year 1958, 1,492 in fiscal year 1959, 1,659 in fiscal year 1960 and 1,693 in fiscal year 1961.

[10] Ibid. Of the 193 rate increases filed by pipeline companies during this period, 37 went into effect without suspension.

filing, and the order accepting same; such determination to be based upon the true, binding effective contractual arrangements, filed or unfiled.

2. The Filed and Finally Accepted Rate is the One and Only Rate Which May Be Charged and Collected for Sales of Natural Gas in Interstate Commerce.

It has hitherto been acknowledged as the *sine qua non* to rate-regulation that the filed rate is the only legal rate, and, as a corollary thereto, that in matters of rate regulation the jurisdiction of the agency charged with administering the regulatory act is primary. These doctrines constitute the very foundation of effective rate regulation and find support in a long consistent line of decisions under the Natural Gas Act, *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287 (4th Cir., 1943), rev'd on other grounds, 320 U.S. 591; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 888 (5th Cir., 1947), cert. denied 332 U.S. 770; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir., 1949); as well as in decisions under rate regulatory statutes similar to the Natural Gas Act, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), *United States* v. *Jones*, 336 U.S. 641 (1949); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949); *Backus-Brooks Co.* v. *Northern Pacific Railway Co.*, 21 F. 2d 4 (8th Cir., 1927), cert. denied 275 U.S. 562; *Chicago, Indianapolis & Louisville Railway Co.* v. *International Milling Co.*, 43 F. 2d 93 (8th Cir., 1930); *Woodrich, et al.* v. *Northern Pacific Railway Co.*, 71 F. 2d 732 (8th Cir., 1934); *Watab Paper*

Co. v. *Northern Pacific Railway Co.*, 154 F. 2d 436 (8th Cir., 1946).

The indispensibility of these doctrines to effective regulation under the Natural Gas Act is further demonstrated by an examination of the provisions of that statute.

In Section 4 of the Act, the statute's multiple standard of just, reasonable and not unduly preferential or discriminatory rates (sub-sections (a) and (b))[11] is coupled with the requirement that all rates subject to the Commission's jurisdiction shall be filed under such rules and regulations as the Commission may prescribe and within such time and in such form as the Commission may designate (subsection (c)).[12] Nor shall the rate thus filed be changed, except after thirty days notice to the Commission and to the public unless otherwise ordered by the Commission (subsection (d)).[13]

Parenthetically it should be recalled that the rates of independent producers such as Petitioner and Movant, which sell natural gas for resale in interstate commerce, were declared subject to the Commission's jurisdiction on June 7, 1954 in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954). Pursuant thereto, the Commission by its series Nos. 174 Orders directed compliance by the producers with the dictates of the Natural Gas Act, and enjoined them by regulation from making any change in rates in effect on and after June 7, 1954 without first filing a change in

---

[11] 15 U.S.C. § 717c.

[12] Ibid.

[13] Ibid.

rates pursuant to Section 4(d) of the Act. The present Commission Regulation specifically applicable to producers provides:[14]

> 154.94 Changes in Rate Schedules
>
> (a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.
>
> (b) Every [such] change . . . shall be filed with the Commission . . . not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

This provision for the filing of any change in rate serves to give notice and opportunity to the Commission and to all interested parties to act before the change goes into effect. Thus the proposed new rate may be suspended within 30 days after it is filed, either on complaint or on the Commission's own motion, for five months, to permit a hearing at which the burden of proof is on the seller to show that the new rate meets the statutory standard (Section 4(e)).[15]

Apart from a change in rate, the Commission is empowered at all times to bring the rates of a natural-gas company subject to its jurisdiction into accordance with the statutory standard by fixing the just and reasonable rate to be thereafter observed upon finding, in a hearing had either upon its own motion or upon com-

[14] 18 C.F.R. § 154.94.

[15] 15 U.S.C. § 717c.

plaint, that the rates being charged are unjust, unreasonable, unduly discriminatory or preferential. (Section 5(a)).[16]

Turning to the other provisions of the Act, it is seen that these, too, are clearly keyed to the filed rate and are framed to make that rate conform to the statutory standard. For example, the Commission is authorized to ascertain the actual legitimate cost of property (Section 6);[17] to prescribe the accounts, records and memoranda to be filed by natural gas companies (Section 8),[18] to determine and fix proper and adequate rates of depreciation and amortization of the several classes of property of each natural gas company (Section 9);[19] to require special reports by natural gas companies (Section 10),[20] to conduct investigations (Section 14),[21] and to perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules, and regulations as it may find necessary or appropirate to carry out the provisions of the Act (Section 16).[22] The constitutional rights of the parties are at all times protected by the statutory provision for judicial review (Section 19(b)).[23]

Continuing, the provision by Congress in Sections 20[24] and 21[25] of the Act of effective means of enforce-

---

[16] 15 U.S.C. § 717d.
[17] 15 U.S.C. § 717e.
[18] 15 U.S.C. § 717g.
[19] 15 U.S.C. § 717h.
[20] 15 U.S.C. § 717i.
[21] 15 U.S.C. § 717m.
[22] 15 U.S.C. § 171o.
[23] 15 U.S.C. § 717r.
[24] 15 U.S.C. § 717s.
[25] 15 U.S.C. § 717t.

ment completes Congressional reliance on the filed rate procedure and on administrative action to enforce the statutory standard of just, reasonable and not unduly discriminatory or preferential rates. The Commission may resort to the courts to enjoin violations of and to enforce compliance with the Act and Commission rules, regulations or orders thereunder, and willful violations thereof are subject to punishment by both fine and imprisonment.

Finally, the intention of Congress to rely on the filed rate procedure and on Commission action to enforce the prescribed rate standard is confirmed by the *omission* from the Act of any provision for recovery of reparations or for preservation of any common law rights or remedies by any private party.[26]

Clearly, therefore, from the very structure of the Act, reinforced by the decision cited, it is apparent that the doctrine that the filed rate is the only legal rate is the very keystone of effective regulation thereunder, and that this doctrine necessarily embraces all rates, "whether fixed or merely accepted by the Commission."[27]

3. Exhaustion of Administrative Remedies Should Have Been Had Prior to Resort to the Courts.

Since the filed rate doctrine and the doctrine of the primacy of the Commission's jurisdiction in matters of rate regulation are correlative, the same authorities

---

[26] It was for these reasons that the Commission stated in footnote 2 on page 9 of its brief in *Northwest Public Service Co.* v. *Montana Dakota Utilities Co.*, 181 F. 2d 19 (8th Cir., 1950) that the District Court's reference to the distinction between rates "merely filed" and rates "approved" by the Commission was not material.

[27] *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-252 (1951).

that support the former also support the latter. Congressional policy in this regard is also clearly evinced by the provision in Section 19(b) of the Act which restricts judicial review to those objections previously urged before the Commission on rehearing, unless reasonable grounds exist for the failure to do so. Additionally, whether filings in compliance with the Act are valid or invalid, complete or incomplete, are matters for the Commission to decide in the first instance. *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 313 U.S. 41 (1938); *Macauley, Acting Chairman of the United States Maritime Commission* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); *FPC, et al.* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947). For decision of such questions are peculiarly necessary and appropriate to administration of the Act, and even if not impliedly authorized by Sections 4(d) and (e) of the Act, would be amply authorized by the general grant of power under Section 16 of the Act.

4. Conclusion.

If the holding of the lower court be the law, what function does Section 4 of the Act serve? Of what value are the Commission's powers to require reports of natural gas companies, to conduct investigations, to determine costs and depreciation, to fix rates of return and, in short, to regulate, if all can be abrogated by court construction of these "private agreements" which are tariffs or rate schedules filed and accepted by the Commission without condition or suspension? How are the effects of these arrangements on the producer, the pipeline company, and the distributing company to be accounted for, evaluated, and controlled? How is the ultimate consumer to be protected by the Federal Power Commission?

Movant submits that the foregoing is sufficient to demonstrate the error of the decision below and the threat posed thereby to effective regulation under the Natural Gas Act. The petition for the writ of certiorari should, therefore, be granted so that the decision of the Court of Appeals below may be reversed and vacated.

Respectfully submitted,

JOHN C. DAWSON
LIDDELL, AUSTIN, DAWSON & SAPP
510 Gulf Building
Houston, Texas

GEORGE D. HORNING, JR.
PATRICK G. SULLIVAN
J. COLIN LIZOTTE
HOGAN & HARTSON
800 Colorado Building
Washington 5, D. C.

Attorneys for Amicus Curiae